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In the Supreme Court of the United States

OCTOBER TERM, 1982

DEIL OTTO GUSTAFSON and JOE WALTERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the disqualification of petitioner Gustafson's attorney, petitioner Walters, because of a conflict of interest violated Gustafson's constitutional rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Statement	1
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Case v. *North Carolina*, 315 F.2d 743	19
Cuyler v. *Sullivan*, 446 U.S. 335	12, 16
Fund of Funds, Ltd. v. *Arthur Andersen & Co.*, 567 F.2d 225	11
Gas-A-Tron of Arizona v. *Union Oil Co.*, 534 F.2d 1322, cert. denied, 429 U.S. 861	17
Leis v. *Flynt*, 439 U.S. 438	10
Morris v. *Slappy*, No. 81-1095 (Mar. 29, 1982)	9
Musicus v. *Westinghouse Electric Corp.*, 621 F.2d 742	11
Novo Terapeutisk Laboratorium v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186	17
Opper v. *United States*, 348 U.S. 84	18
Powell v. *Alabama*, 287 U.S. 45	9
Silver Chrysler Plymouth, Inc. v. *Chrysler Motors Corp.*, 518 F.2d 751	17
Trone v. *Smith*, 621 F.2d 994	11, 13
United States v. *Bright*, 630 F.2d 804	18
United States v. *Dinitz*, 424 U.S. 600	10
United States v. *Dolan*, 570 F.2d 1177	16
United States v. *Flanagan*, No. 81-3116 (3d Cir. June 2, 1982)	9
United States v. *Gougis*, 374 F.2d 758	18
United States v. *Greger*, 657 F.2d 1109, petition for cert. pending, No. 81-1357	8
United States v. *Mardian*, 546 F.2d 973	18
United States v. *Partin*, 601 F.2d 1000, cert. denied, 446 U.S. 964	13

Cases—Continued Page

United States v. *Salinas*, 618 F.2d 1092 10
United States v. *Vargas-Martinez*, 569 F.2d 1102.. 13
United States v. *Young*, 644 F.2d 1008 13
Westinghouse Electric Corp. v. *Gulf Oil Corp.*, 588 F.2d 221 11

Constitution, statutes and rules:

United States Constitution:
Fifth Amendment, Due Process Clause 8, 9
Sixth Amendment 4, 9, 19
Judiciary Act of 1789, ch. 20, Section 35, 1 Stat. 92, now codified at 28 U.S.C. 1654 9
28 U.S.C. 1291 8
Fed. R. Crim. P.:
Rule 8(b) 18
Rule 44(c) 12, 14, 15

Miscellaneous:

ABA Comm. on Professional and Judicial Ethics, Formal Opinion No. 342 (1975), 62 A.B.A.J. 517 (1976) 10, 13
ABA, *Standards Relating to the Administration of Justice, The Defense Function* (1974) 12
ABA, Code of Professional Responsibility:
DR 4-101 (1980) 10, 11
DR 5-105 (1980) 12
DR 5-105(D) (1980) 16-17
EC 5-15 (1976) 12
Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244 (1981) 12-13
Note of the Advisory Committee on Fed. R. Crim. P. 44(c), 77 F.R.D. 594 (1978) 12, 13, 14, 15, 16

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-30 to A-52) is reported at 675 F.2d 965, and the opinion of the court of appeals after remand (Pet. App. A-64 to A-66) is not yet reported. The original opinion of the district court (Pet. App. A-1 to A-29) is reported at 528 F. Supp. 1300, and the opinion of the district court on remand (Pet. App. A-52 to A-63) is reported at 538 F. Supp. 1149.

STATEMENT

1.a. On November 5, 1981, a 32-count indictment was returned against petitioner Gustafson and five other individuals, charging them with mail fraud,

wire fraud, misapplication of bank funds, false entries on bank records, and conspiracy. In particular, the indictment charged that the defendants used a check floating scheme to obtain interest-free loans from Summit National Bank of St. Paul and Summit State Bank of Richfield for the benefit of two business entities: the Tropicana Hotel and Country Club—a Las Vegas hotel and gambling casino—and Production and Leasing, Ltd.—a Nevada Corporation that produced a floor show for the Tropicana (Pet. App. A-31 to A-32). Petitioner Gustafson owned the Summit Banks and held a substantial interest in Tropicana (*id.* at A-32).

b. Following the defendants' arraignment, the government, on November 20, 1981, filed a motion requesting the district court to conduct an inquiry into the possibility that petitioner Gustafson's attorney, petitioner Walters, had a conflict of interest (Pet. App. A-31).[1] During the grand jury investigation and until after arraignment, Walters, in addition to representing petitioner Gustafson, had represented co-defendant Roger Newstrum. The latter was an

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[1] The government also asserted that the attorneys for co-defendants Agosto (owner of Production and Leasing), Bacigalupo (vice president and cashier of the St. Paul Bank), and Norris (Agosto's executive secretary) also had conflicts of interest. The district court ordered the disqualification of counsel for Agosto and Norris, but not of counsel for Bacigalupo (Pet. App. A-8 to A-14, A-16, A-20 to A-22, A-23, A-26, A-28 to A-29). The court of appeals sustained the disqualification of Norris's attorney (*id.* at A-50 to A-51), but reversed the order disqualifying Agosto's attorney and remanded for further proceedings on this issue (*id.* at A-46 to A-50). Agosto subsequently discharged his attorney, however, thereby obviating any need for further proceedings on remand (*id.* at A-53 n.1).

officer and employee of various Gustafson-owned companies, and at various times was a corporate officer of Tropicana and vice-president and director of the Richfield Bank (*id.* at A-6). Until the return of the indictment, Walters also had represented co-defendant Ralph Bruins, the president and director of the Richfield Bank and a consultant to the St. Paul Bank.[2] The government asserted that Gustafson's defense at trial would conflict with that of co-defendants Bruins and Newstrum (*id.* at A-7).

Petitioner Gustafson submitted two affidavits with the court regarding the disqualification issue and testified at a hearing on December 16, 1981. Gustafson testified that he understood that due to Walter's prior representation of Bruins and Newstrum, Walters would not be able to cross-examine those defendants vigorously if they testified at trial, but that he was nonetheless willing to continue with Walters' representation (12/16/81 Tr. 13-14). The court then asked Gustafson whether he understood that if the government presented evidence of fraud, a conflict might arise because his co-defendants might well be inclined to cast the blame on others (12/16/81 Tr. 25-26). Gustafson admitted that he had not explored with Walters the various ways in which a conflict

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[2] In addition, during the grand jury investigation, Walters had represented six other Gustafson employees who either had been called as witnesses by the grand jury or had been interviewed by the F.B.I. The district court concluded that Walters' representation of Gustafson would conflict with the interests of these six witnesses as well (Pet. App. A-6, A-16, A-26), but the court of appeals reversed the disqualification order insofar as it rested on a finding of a conflict of interest resulting from Walters' prior representation of the witnesses (*id.* at A-39 to A-41). This issue therefore is not involved here.

might arise (*ibid.*), but stated that he was satisfied with Walters' continued representation (*id.* at 27). However, Gustafson declined to waive his Sixth Amendment right to the effective assistance of counsel (Pet. App. A-6).[3] Counsel for Bruins and Newstrum also informed the court that their clients would not waive their attorney-client privilege with Walters, which would have permitted Walters to cross-examine them without fear of betraying their confidences (12/16/81 Tr. 90-91).[4]

Based on this evidence, the district court disqualified Walters from further representation of Gustafson, finding that there was a substantial possibility that conflicts of interest existed or would arise during trial (Pet. App. A-16):

> Attorney Walters' representation of three of the principal defendants prior to the indictment presents major difficulties, not only with regard to cross-examination of the co-defendants, but also with regard to planning trial strategy, arguing the relative culpability of the defendants to the jury, and the questioning of other witnesses regarding these defendants' participation in the crimes charged.

The district court further held (Pet. App. A-28 n.3) that Gustafson's proposal to retain back-up counsel

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[3] Although Gustafson, in response to the court's questioning, indicated that he had signed a waiver of his Sixth Amendment rights (12/16/81 Tr. 26), Walters denied that Gustafson had executed any such waiver (*id.* at 30). Thereafter, Gustafson stated that he wished to defer for a short time a decision as to waiver (*id.* at 31-32).

[4] The district court had suggested that Walters consult with the Minnesota Lawyers Professional Responsibility Board regarding the ethical propriety of his actions, but he chose not to do so (Pet. App. A-28; 12/16/81 Tr. 5-6).

to conduct cross-examination of Newstrum and Bruins would not adequately protect Walters' former clients and eliminate the conflicts of interests it found.

2. The court of appeals reversed the district court's disqualification of Walters and remanded for further proceedings (Pet. App. A-39 to A-46). The court agreed with the district court that, in two respects, a possible conflict of interest existed in connection with Walters' representation of co-defendants Bruins and Newstrum. First, Walters might be tempted to use the confidences he had acquired from Bruins and Newstrum to their detriment. Second, Walters might overcompensate and fail to cross-examine Bruins and Newstrum fully for fear of misusing confidential information (*id.* at A-42 to A-46).

Turning to the first inquiry, the court found that disqualification of Walters was appropriate only upon a clear showing that the interests of his present and former clients were adverse. Because Gustafson had claimed that all the defendants intended to present a joint defense and that there was no adversity of interests, the court held that the district court had erred in rejecting this assertion without first questioning Bruins and Newstrum as to its validity. The court therefore directed the district court to determine whether the interests of Gustafson, Bruins, and Newstrum in fact were adverse; if the district court determined that they were, it was directed to inquire whether Bruins and Newstrum were willing to consent to Walters' continued representation of Gustafson, and to the use of back-up counsel (Pet. App. A-43 to A-45). As to the second potential area of conflict—the possibility that Walters might not fully cross-examine defendants Bruins and Newstrum for fear of disclosing or misusing confidential information

they furnished him—the court directed the district court on remand to require Gustafson to waive his right to effective assistance of counsel as a condition to his continued representation by Walters (*id.* at A-45 to A-46).

3. On remand, after conducting an in camera hearing with defendants Bruins and Newstrum and their counsel,[5] the district court disqualified Walters (Pet. App. A-63). The court noted that after a "thorough inquiry," both Bruins and Newstrum had declined to join in Gustafson's contention that all defendants intended to present a joint defense, and found that a "clear showing" had been made that Bruins and Newstrum had interests adverse to those of Gustafson (*id.* at A-55).[6] The district court further found that Bruins and Newstrum had "emphatically declined" to waive any privilege or right that might be adversely affected by such representation, including the use of back-up counsel (*id.* at A-56).

The district court also denied Gustafson's motion for a severance (Pet. App. A-63), finding that a severance would not eliminate the conflict of interest. The district court further concluded that severance would be inappropriate in any event. Because Gustafson's right to effective assistance of counsel would not be jeopardized by requiring Gustafson to proceed to a joint trial with new counsel, and in light of the fact that

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[5] The transcripts of the in camera proceedings were ordered sealed, and the government was not granted access to them (Pet. App. A-54 to A-55 & n.2).

[6] The district court noted that, quite aside from the clear showing made in the in camera hearing, the record cast doubt on the good faith and validity of Gustafson's assertion that a joint defense of all defendants was intended in the instant case (Pet. App. A-55 n.3).

the trial was expected to be a lengthy one, the court concluded that interests of judicial economy and the burden on disinterested witnesses outweighed Gustafson's right to be represented by counsel of his choice (*id.* at A-60 to A-63).

4. The court of appeals affirmed the disqualification of Walters (Pet. App. A-65 to A-66). The court found that given the "potential for clearly adverse interests" among Gustafson, Newstrum and Bruins and the refusal of Newstrum and Bruins to consent to or otherwise waive any claim relating to Walters' continued representation of Gustafson, an "irreconcilable potential conflict" existed (Pet. App. A-66). In this regard, the court observed (*ibid.*) that Bruins and Newstrum could be adversely affected if Walters used confidential information obtained during the period of concurrent representation and that this potential harm would arise whether the defendants were tried jointly or separately. Because Bruins and Newstrum refused to waive any claim that they might have based on the possible conflict, the court concluded that no alternative less burdensome than disqualification was available to alleviate the effects of the conflict (*ibid.*).

We have been informed by the Assistant United States Attorney handling the case that Gustafson has now retained new counsel to represent him at trial and that the new counsel already has participated in several pretrial matters. Trial of petitioner and his co-defendants is now scheduled for November 8, 1982.

ARGUMENT

Petitioners[7] claim (Pet. 11-20) that the district court's disqualification order violated Gustafson's constitutional right to proceed to trial with counsel of his choice.[8] However, on the facts of this case, in

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[7] Petitioner Walters does not allege in the petition any interest in the instant case distinct from that of his client that would make him a proper party to challenge the district court's disqualification order. The argument in the petition focuses on the rights of petitioner Gustafson to be represented by counsel of his choice. In their brief on appeal, however, Gustafson and Walters asserted (Br. 47 n.52) that the district court's order impaired Walter's interest as an attorney, protected by the Due Process Clause of the Fifth Amendment, in practicing his profession without arbitrary interference. They further argued (*ibid.*) that Walters had a related interest in vindicating his reputation, because allegations of impropriety were "arguably implicit" in the district court's order. We have considerable doubt that an interlocutory appeal by defense counsel in a criminal case is an apropriate means for counsel to vindicate his own interests, as distinguished from the interests of the defendant. Because Gustafson also is a party in this Court and petitioners' argument relates to Gustafson's interests, however, there is no need to consider this issue here.

[8] Although the government did not challenge the court of appeals' jurisdiction, the court of appeals held (Pet. App. A-31 n.1) that the order disqualifying Walters was immediately appealable pursuant to 28 U.S.C. 1291 under the collateral order doctrine. The court noted, however, that the Ninth Circuit had reached a contrary conclusion in *United States* v. *Greger*, 657 F.2d 1109 (1981), petition for cert. pending, No. 81-1357. As we have explained more fully in our Brief in Opposition in *Greger* (at 9-12), we believe there is considerable merit to the Ninth Circuit's holding that pre-trial orders disqualifying defense counsel are not immediately appealable pursuant to 28 U.S.C. 1291. Although this jurisdictional issue might warrant review at some point, we have not sought certiorari on this issue at the present time

which counsel's former clients have refused to waive their attorney-client privilege, the district court was entirely justified in ordering the disqualification of Walters. Further review therefore is not warranted.

1. a. Petitioners contend (Pet. 6, 8, 11, 19) that the order disqualifying Walters from representing Gustafson impermissibly interferes with Gustafson's right to counsel of his choice. However, the Constitution protects a defendant's decision to retain a particular attorney only against arbitrary interference (*Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *United States* v. *Flanagan*, No. 81-3116 (3d Cir. June 2, 1982), slip op. 7); it does not afford a defendant an absolute right to counsel of his choice irrespective of reasonable rules governing the conduct of criminal trials and the qualifications and ethical conduct of attorneys. That the Fifth and Sixth Amendments were not understood by the Congress that proposed them to support such an extreme position is confirmed by the First Congress' contemporaneous enactment of Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92, now codified at 28 U.S.C. 1654. That section provided that parties in courts of the United States may manage their causes by the assistance of such counsel "as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

Surely, for example, a defendant does not have an absolute constitutional right to be represented by a

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in view of the pendency of *Morris* v. *Slappy*, No. 81-1095, (Mar. 29, 1982). One aspect of that case concerns the weight to be accorded a defendant's choice of a particular attorney, a question that the Ninth Circuit concluded in *Greger* had some bearing on whether a disqualification order is immediately appealable under the collateral order doctrine.

petition for cert. granted

lawyer who has not been admitted to practice before the court, cf. *Leis* v *Flynt*, 439 U.S. 438 (1979), an attorney who is implicated in the very crime in question, *United States* v. *Salinas*, 618 F.2d 1092 (5th Cir. 1980), or an attorney whose conduct in the case has been contemptuous, *United States* v. *Dinitz*, 424 U.S. 600, 603-605 (1976). It is equally clear, we submit, that a criminal defendant does not have a constitutional right to be represented by an attorney whose appearance in the case would violate ethical rules designed to preserve the integrity of the legal profession and the criminal justice system, and the public's confidence in that integrity.

b. Among these ethical rules is the established principle that a lawyer must preserve the confidences and secrets of a client, absent the client's consent to disclosure. ABA Code of Professional Responsibility DR 4-101 (1980). The requirement that an attorney preserve client confidences restricts the attorney's ability to represent one client in a matter where that client's interests are adverse to those of a former client. See ABA Comm. on Professional and Judicial Ethics, Formal Opinion No. 342 (1975), 62 A.B.A.J. 517-518 (1976). In order to ensure that a lawyer will not disclose the confidences of a client, the courts uniformly have held that a lawyer is disqualified from representing a party in litigation if he formerly represented an adverse party in the same or a substantially related matter, so that he may be in a position to disclose confidential information obtained in the course of the former representation or to utilize that information to the detriment of the former client. To require more—*i.e.*, a showing of what confidences actually were disclosed and how they might be affected by the lawyer's subse-

quent representation—would risk exposure of the very attorney-client confidences that it is the purpose of DR 4-101 and the disqualification rule to protect. 62 A.B.A.J. at 517 & n.6. See, *e.g.*, *Musicus* v. *Westinghouse Electric Corp.*, 621 F.2d 742 (5th Cir. 1980); *Trone* v *Smith*, 621 F.2d 994, 998-999 (9th Cir. 1980); *Westinghouse Electric Corp.* v *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977).

The foregoing principles fully support the district court's disqualification order in this case. Walters' prior representation of Bruins and Newstrum was in connection with the very criminal matter in which he sought to represent Gustafson, and petitioners have not attempted to show that Walters in fact received no confidential information from Bruins and Newstrum relating to the instant case. The district court found, after a "thorough inquiry" into the matter on remand, that a "clear showing ha[d] been made that Bruins and Newstrum have interests in this matter that are adverse to those of Gustafson" (Pet. App. A-55). Moreover, both Bruins and Newstrum refused to waive their attorney-client privilege with Walters and thereby to consent to the possible disclosure or utilization of confidences by Walters in his representation of Gustafson. Indeed, although the transcript of the in camera proceedings was sealed and we therefore have not reviewed it, the district court stated that Bruins and Newstrum "emphatically declined" to consent to the representation of Gustafson by Walters and to the use of back-up counsel to conduct cross-examination of them (*id.* at A-56). In these circumstances, the court of appeals correctly affirmed the district court's disqualification order.

c. The ability of an attorney properly to represent a client in a matter in which he previously represented another client also is restricted by the attorney's overriding ethical obligation to "avoid conflicting representations" (*Cuyler* v. *Sullivan*, 446 U.S. 335, 346 (1980)). Established ethical rules provide that a lawyer may not represent several clients in a matter unless all consent *and* it is "obvious" or "clear" that he can adequately protect the interests of each. ABA Code of Professional Responsibility DR 5-105, EC 5-15 (1976), cited in *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346 n.11; ABA, *Standards Relating to the Administration of Justice, The Defense Function* § 3.5(b), at 123 (1974). These rules plainly contemplate that counsel cannot ethically represent multiple criminal defendants with conflicting interests even if all give their consent, which Bruins and Newstrum have not done here.

This Court's promulgation of Fed. R. Crim. P. 44 (c) reflects the same view. That rule requires the district court to inquire into possible conflicts of interest in all cases of joint representation and to take "such measures as may be appropriate" to protect each defendant's right to counsel unless it appears that there is " good cause to believe no conflict of interest is likely to arise." The Note of the Advisory Committee on Rule 44(c) makes clear that disqualification of defense counsel is one of the appropriate measures available to the district court where there is not good cause to believe that the representation is likely to be free of conflicts of interest. The Note also makes clear that the district court may order such disqualification notwithstanding the defendants' desire to proceed with multiple representation. 77 F.R.D. 594, 600-603 (1978). See also *Developments*

in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1394-1395 (1981).

In the present case, Walters had ceased to represent Bruins and Newstrum after indictment and arraignment. He therefore was not confronted with conflicts of interest resulting from continuing *joint* representation of several defendants, the situation to which Rule 44(c) is specifically directed. However, much the same potential for conflict of interest arises in a case such as this as in cases of active representation of several defendants. See, *e.g.*, *United States* v. *Young*, 644 F.2d 1008, 1012 (4th Cir. 1981). There is, of course, the potential for the misuse of confidences of the former client, discussed above. Moreover, the termination of Walters' representation of Bruins and Newstrum did not terminate his duty of loyalty to them with respect to the subject matter of the representation. Because the district court found that their interests were adverse to those of Gustafson, Walters' duty of loyalty to Bruins and Newstrum would be impaired by his representation of Gustafson. The result of such representation could be to undermine the confidence of the public in the integrity of the bar and, more specifically, to undermine the confidence of criminal defendants that their attorneys will not subsequently withdraw and assume an adversarial posture in the case. See *Trone* v. *Smith*, *supra*, 621 F.2d at 998-999; ABA Formal Opinion No. 342, *supra*, 62 A.B.A.J. at 518. Thus, especially in view of the refusal of Bruins and Newstrum to waive any claim arising out of the potential conflict, the district court properly disqualified Walters. *United States* v. *Vargas-Martinez*, 569 F.2d 1102 (9th Cir. 1978); compare *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980).

d. Petitioners err (Pet. 11-14) in contending that the court of appeals in effect adopted a per se rule requiring disqualification in all cases of successive representation. The decision below no more announces a per se rule against successive representation than Fed. R. Crim. P. 44(c) announces a per se rule against joint representation. The court of appeals made clear that such representation is permissible if the rights of all interested persons are fully protected, just as joint representation is permissible under Fed. R. Crim. P. 44(c) if all defendants' rights are protected. In applying that standard in the circumstances of this case, however, the court of appeals found that Walters' representation of Gustafson presented a serious and irreconcilable potential conflict with the interests of Bruins and Newstrum and ordered disqualification when the latter defendants declined to consent to the arrangement and waive any claims arising out of it. The court of appeals' resolution of this fact-bound issue does not warrant further review.

2. Petitioners argue (Pet. 7-9, 13-14, 16) that disqualification was inappropriate in this case because the conflict of interest was only "potential," not "actual." This assertion is erroneous. The district court found that "a clear showing has been made that Bruins and Newstrum have interests in this matter that are adverse to those of Gustafson" (Pet. App. A-55). Such a finding establishes an actual, not merely a potential conflict of interest. It is true that the court of appeals used the term "potential conflict" (Pet. App. A-65, A-66). But use of this term may reflect nothing more than the obvious fact that the trial has not yet occurred and that the court therefore could not be certain of the precise manner in which the interests of Gustafson, Bruins, and

Newstrum would be affected by Walters' representation.

The conclusion that Walters had an actual conflict of interest is confirmed by the ethical rule of automatic disqualification, discussed above (see pages 10-11, *supra*), in cases of successive representation where the lawyer has received confidences relating to the matter from a former client having adverse interests and the former client has not consented to the representation. This rule is premised on the view that the lawyer in such a situation has a disabling conflict of interest based on the *possibility* that he might be in a position to misuse the former client's confidences, even though the occasion for such misuse has not yet arisen and indeed even though the potential misuse might not actually occur.

We note as well that a trial court must resolve conflict of interest problems prior to trial, so that if substitute counsel is required, he may be retained sufficiently in advance of trial to permit him to become familiar with the case. Because the matter must be resolved prior to trial, the district court necessarily must base its actions in large part upon its informed prediction of how likely it is that a conflict of interest will materialize at trial. Fed. R. Crim. P. 44(c) recognizes this reality by requiring that the district court take appropriate measures (which may include disqualification) promptly, in advance of trial, in all cases where there is not good cause to believe that no conflict of interest is likely to arise; it does not permit the district court to wait until a conflict of interest has actually manifested itself at trial. Such pretrial measures are prophylactic in nature, designed to protect the defendants' right to effective assistance of counsel, to ensure that a conviction will not be vulnerable to collateral attack, to preserve the integrity of the

criminal justice system, and to ensure that defense counsel adhere to the standards of the profession barring conflicting representation. See Note of the Advisory Committee on Fed. R. Crim. P. 44(c), 77 F.R.D. at 603, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978).

Accordingly, contrary to petitioner's contention (Pet. 13-14), a district court's ordering of disqualification in advance of trial because of the likelihood that a conflict of interest will arise is fully consistent with the requirement that in order for a court to set aside a conviction after trial on the basis of an asserted Sixth Amendment violation, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980).

3. Finally, petitioners contend (Pet. 15-20) that the district court abused its discretion in disqualifying Walters rather than resolving the conflict by permitting Gustafson to retain back-up counsel to conduct any cross-examination of co-defendants Bruins and Newstrum or by severing Gustafson's case from that of his co-defendants. The district court, however, properly rejected these alternatives.

Retention of back-up counsel to cross-examine Bruins and Newstrum would not have solved the ethical dilemma posed by Walters' prior representation of these two co-defendants. Such an arrangement would not ensure that Walters would not share confidential information with the back-up counsel, who could in turn utilize it in the course of cross-examination. The rules of the legal profession ordinarily require that where an attorney is disqualified, his partners and associates and other lawyers affiliated with him are disqualified as well, in part because of the presumption that confidences may be shared among affiliated lawyers. See ABA Code

of Professional Responsibility DR 5-15(D) (1980); *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 196-197 (7th Cir. 1979) (en banc); *Gas-A-Tron of Arizona* v. *Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.), cert. denied, 429 U.S. 861 (1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975). The result should be no different, at least absent consent of the former client, where, as petitioners proposed here, the principal and back-up counsel would be associated for purposes of the representation of a client in a particular case.

Moreover, even assuming that in briefing back-up counsel, Walters did not disclose, either intentionally or inadvertently, confidential communications that he had acquired during his prior representation of the two defendants, the right of Bruins and Newstrum to a fair trial still might be infringed. This is so because Walters' knowledge of confidential communications detrimental to his two former clients could affect his conduct of other aspects of the trial. For instance, Walters' possession of any confidences and secrets detrimental to Bruins and Newstrom could impermissibly benefit Walters in any argument he made to the jury concerning the relative culpability of the defendants, or in his questioning of other witnesses regarding the defendants' participation in the offenses charged.

Nor could the conflict have been satisfactorily resolved by severing Gustafson's case from that of his co-defendants. As the district court found in rejecting Gustafson's severance motion (Pet. App. A-58 to A-59), if the cases were severed and Gustafson was tried prior to Bruins and Newstrum, Walters could use the confidential information imparted by Bruins and Newstrum in planning trial strategy and examining other witnesses, thereby possibly eliciting testi-

mony exculpating Gustafson and inculpating Bruins and Newstrum. Such evidence could be used by the prosecution in the subsequent trial of Bruins and Newstrum. Even if Bruins and Newstrum were tried prior to Gustafson, Walters could still be tempted to use their confidences in defending Gustafson. Although such use would not affect the outcome of Bruins and Newstrum's criminal case, it could be used in any civil proceeding brought against them in connection with their alleged criminal activities, or might otherwise be detrimental to their interests.

Moreover, as the district court further held, even if a severance were thought to eliminate the ethical conflict, petitioner Gustafson was not automatically entitled to a severance. If he were, this would afford powerful incentive to a defendant wishing but not otherwise entitled to secure a severance to retain counsel with a conflict of interest. Moreover, a severance motion is addressed to the sound discretion of the trial court. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980). Requiring Gustafson to proceed to joint trial with new counsel will not render his trial unfair, and given the predicted length of the trial, considerations of judicial economy weigh heavily against severance. In these circumstances, the district court did not abuse its discretion in declining to order a severance.[9]

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[9] The cases upon which petitioner relies (Pet. 17) do not hold that a defendant has an absolute right to a severance in lieu of retention of new counsel where it appears prior to trial that the attorney has a conflict of interest. *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), did not even involve the issue of a conflict of interest. In *United States* v. *Gougis*, 374 F.2d 758, 759-760 (7th Cir. 1967), the court reversed a conviction because court-appointed counsel for two defendants was shown to have had an actual conflict

Finally, any waiver by Gustafson of his Sixth Amendment right to the effective assistance of counsel would not have resolved the conflict. Whatever the merits of Gustafson's claim (Pet. 18-19) that he had an absolute right to waive any conflict that adversely affected his own right to the effective assistance of counsel, he could not waive the corresponding right of co-defendants Bruins and Newstrum to a fair trial and the confidentiality of information imparted to Walters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of interest, without reaching the defendant's argument that he was improperly joined under Fed. R. Crim. P. 8(b) because the offenses with which he was charged related to those of the other defendants. No issue of severance on conflict of interest grounds was raised. In *Case* v. *North Carolina*, 315 F.2d 743 (4th Cir. 1963), the court held that the defendant's Sixth Amendment right to the effective assistance of counsel was violated when the court declined to grant a severance of the trial of two defendants having conflicting interests who were represented by the same attorney. Gustafson does not assert that he will receive ineffective assistance from substitute counsel. Moreover, the court in *Case* did not suggest that it would have been improper to require the defendants to proceed to a joint trial represented by separate counsel to cure the conflict of interest, rather than granting a severance.

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